

83-6549

Office - Supreme Court, U.S.
FILED
APR 11 1984
ALEXANDER L. STEVENS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

JIMMY LEE SMITH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

ROBERT AUGUSTUS HARPER, JR.
Pro Bono Counsel for Petitioner
Robert Augustus Harper, Jr. & Assoc.
308 East Park Avenue
Post Office Box 10132
Tallahassee, Florida 32302
(904) 224-5900

QUESTION PRESENTED FOR REVIEW

THE SUPREME COURT OF FLORIDA, A COURT OF LAST RESORT, HAS DECIDED THE FEDERAL QUESTION OF EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS IN A WAY WHICH CONFLICTS WITH THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT [U.S. SUP. CT. RULE 17.1(b)], and ULTIMATE RESOLUTION IS PENDING IN THE SUPREME COURT OF THE UNITED STATES CASE *STRICKLAND v. WASHINGTON*, CASE NO. 82-1554.

TABLE OF CONTENTS

	<u>Page</u>
Question Presented for Review	i
Table of Contents	ii
Table of Citations	iii
Citation to Opinions Below	1
Jurisdictional Grounds	1
Constitutional and Statutory Provisions	3
Statement of the Case	4
Appendices	
Appendix A - Statement of Judicial Acts to Be Reviewed, filed 9 March 1983	A1
Appendix B - Opinion of Florida Supreme Court, rendered 12 November 1981	B1
Appendix C - Opinion of Florida Supreme Court, rendered 10 November 1983	C1
Appendix D - Order of Florida Supreme Court, rendered 8 March 1984	D1

TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
<i>Armstrong v. State</i> , 429 So.2d 287 (fla. 1983)	5
<i>Bonner v. City of Prichard, Alabama</i> , 661 F.2d 1206 (11th Cir. 1981)	2
<i>Knight v. State</i> , 394 So.2d 997 (Fla. 1981)	2, 5, 6
<i>Smith v. State</i> , 407 So.2d 894 (Fla. 1981) cert. denied 456 U.S. 984, 102 S.Ct. 2260, 72 L.Ed.2d 864 (1982)	1
<i>Smith v. State</i> , 445 So.2d 323 (Fla. 1983)	1, 2, 3
<i>Stein v. Reynolds Securities, Inc.</i> , 667 F.2d 33 (11th (11th Cir. 1982)	2
<i>Strickland v. Washington</i> , U.S. Sup. Ct. Case No. 82-1554	1, 3, 6
<i>United States v. DeCoster</i> , 624 F.2d 196 (D.C. Cir. 1979) (en banc)	2
<i>Washington v. Strickland</i> , 673 F.2d 897 (5th Cir. 1982)	4
<i>Washington v. Strickland</i> , 693 F.2d 1243 (5th Cir. 1982) (en banc)	2, 3, 4, 5, 6
<u>Other</u>	
Amendment VI, U.S. Constitution	3
Amendment XIV, U.S. Constitution	3
Conflitti, <i>New Focus on Prejudice in Ineffective Assistance Cases: The Assertion of Rights Standard</i> , 21 Amer.Crim.L.R. 28 (Summer 1982)	4
Rule 17.1(b), U. S. Sup. Ct. Rules	1
Rule 3.850, Fla. R. Crim. P.	2
28 U.S.C. §1257(3)	1
28 U.S.C. §1267	4

OCTOBER TERM 1983

JIMMY LEE SMITH,	:	
	:	CASE NO.
Petitioner,	:	
	:	
v.	:	
	:	
STATE OF FLORIDA,	:	
	:	
Respondent.	:	
_____	:	

APPLICATION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

JIMMY LEE SMITH, *in forma pauperis*, by and through undersigned counsel, *pro bono*, petitions this Court to issue its writ of certiorari to the Supreme Court of Florida, as follows:

I. THE SUPREME COURT OF FLORIDA, A COURT OF LAST RESORT, HAS DECIDED THE FEDERAL QUESTION OF EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS IN A WAY WHICH CONFLICTS WITH THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT [U.S. SUP. CT. RULE 17.1(b)], and ULTIMATE RESOLUTION IS PENDING IN THE SUPREME COURT OF THE UNITED STATES CASE *STRICKLAND v. WASHINGTON*, CASE NO. 82-1554.

II. OPINIONS BELOW

Direct appeal of the original conviction is reported as *Smith v. State*, 407 So.2d 894 (Fla. 1981), *cert. denied* 456 U.S. 984, 102 S.Ct. 2260, 72 L.Ed.2d 864 (1982). Appeal of denial of Petitioner's Motion for Post Conviction Relief [Fla. R. Crim. P. Rule 3.850] is found, *Smith v. State*, 445 So.2d 323 (Fla. 1983).

III. JURISDICTIONAL GROUNDS

Petitioner seeks to invoke the discretionary jurisdiction of the Supreme Court of the United States pursuant to 28 U.S.C. §1257(3) under the considerations of Rule 17.1(b), U.S. Sup. Ct. Rules.

Petitioner was convicted in the Fourteenth Circuit Court, Jackson County, Florida, for the capital murder of two persons. Pursuant to jury recommendation the state trial judge imposed the death sentence on 04 October 1978. A death warrant was signed by the Governor of Florida on

02 March 1983, and Petitioner, through other counsel sought post conviction relief before the same trial judge by means of Rule 3.850, Fla. R. Crim. P. The Motion for Post Conviction Relief was denied without hearing on 09 March 1983, and an appeal was perfected to the Supreme Court of Florida on the same date. A stay of execution followed. The Supreme Court of Florida denied relief and affirmed the proceedings by written opinion on 10 November 1983, reported as *Smith v. State*, 445 So.2d 323 (Fla. 1983), rehearing was denied on 08 March 1984. The opinion hinges upon the federal question of effective assistance of counsel under the Sixth and Fourteenth Amendments. The Supreme Court of Florida followed its long standing four pronged test of *Knight v. State*, 394 So.2d 997 (Fla. 1981):

1. The specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading.
2. The defendant must meet the burden of proving that the specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel.
3. The defendant must show a likelihood that the deficient conduct affected the outcome of the proceeding.
4. The State must fail to rebut the questions of ineffective assistance by showing beyond reasonable doubt that there was no prejudice in fact.

The Supreme Court of Florida squarely noted [Jimmy Lee] *Smith v. State*, *supra*, 445 So.2d 323 at 325, that

Appellant has failed to allege specific facts to demonstrate that, but for any of the claimed omissions of trial counsel, the results of appellant's case would have been different.

The *Knight* decision cited as authority for the "outcome determinative" element of its four prong test *United States v. DeCoster*, 624 F.2d 196 (D.C. Cir. 1979) (*en banc*), *Knight v. State*, *supra*, 394 So.2d at 1001. This element of the *DeCoster* rule was specifically rejected in *Washington v. Strickland*, 693 F.2d 1243, 1261 (5th Cir. 1982) (*en banc*) ^{1/}.

^{1/} Binding on the Eleventh Circuit, *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206 (11th Cir. 1981); *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982).

Washington provided a three prong test to apply to claims of ineffective assistance:

1. Whether the right to effective assistance of counsel was violated.
2. Whether the petitioner suffered actual and substantial detriment to the conduct of his defense.
3. Whether, in the context of the entire case, the detriment suffered was harmless beyond a reasonable doubt.

Washington v. Strickland, *supra*, 693 F.2d at 1263-64.

The Supreme Court of Florida squarely noted [Jimmy Lee] *Smith v. State*, *supra*, 445 So.2d at 325 that:

. . . the defendant has the burden to show that this deficiency when considered under the circumstances of his case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings.

The conflict clearly reflects jurisdiction may vest with the Supreme Court of the United States. *Strickland v. United States*, Case No. 82-1554.

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment VI of the Constitution of the United States provides that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, where district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV of the Constitution of the United States provides *inter alia*, that:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

28 U.S.C. §1267 provides, *inter alia*, that:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commisison held or authority exercised under, the United States.

V. STATEMENT OF THE CASE

In *Washington v. Strickland*, a habeas corpus petitioner alleged that his attorney had not adequately investigated character evidence that could have been presented in mitigation of his sentence. The Fifth Circuit en banc modified an earlier panel decision in the same case [*Washington v. Strickland*, 673 F.2d 879 (5th Cir. 1982)]. The earlier panel decision itself had modified Fifth Circuit law on ineffective assistance of counsel. The panel established a standard consisting of two basic elements. First, the defendant was required to prove that "but for his counsel's ineffectiveness his trial, but not necessarily its outcome, would have been altered in a way helpful to him." (*Id.*, 673 F.2d at 902). Overall, the panel's standard is quite similar to that adopted by the en banc court, the *Washington II* ^{2/} standard; a defendant must first prove a violation of the Fifth Circuit's "reasonably likely to render, and rendering, reasonably effective assistance" standard.

^{2/} See; Conflitti, *New Focus on Prejudice in Ineffective Assistance of Counsel Cases: The Assertion of Rights Standard*. 21 Amer. Crim. L. R. 28 (Summer 1983).

The second element of the standard relates to the showing of prejudice. The Court of Appeals required the defendant to prove that counsel's ineffectiveness "resulted in actual and substantial disadvantage to the course of [defendant's] defense." The requirement does not require proof of prejudice to the outcome of the proceedings (*Washington v. Strickland*, *supra*, 693 F.2d at 1262). The state has the opportunity to rebut defendant's showing by demonstrating that defense counsel's ineffectiveness was harmless to the outcome of the trial, similar to the *Knight v. State* rationale.

Prejudice flowing from any counsel ineffectiveness must be shown. Prejudice measured under the test enunciated in *Washington v. Strickland* requires a petitioner to demonstrate that counsel's ineffectiveness "resulted in actual and substantial disadvantage to the course of his defense" but need not show that this "disadvantage determined the outcome of the entire case" (693 F.2d at 1262). The Supreme Court of Florida has acknowledged the "different and more elaborate analysis set forth in *Washington v. Strickland*" [*Armstrong v. State*, 429 So.2d 287, 290 (Fla. 1983)]. Apparently the Supreme Court of Florida has observed that the *Knight v. State* test may not fit all challenges of ineffective assistance of counsel claims (*Id.*) ^{3/}

The major difference of the *Washington II* standard is focus on prejudice. *Knight* requires a defendant to show that the ineffective assistance prejudiced the outcome of the trial, an "outcome determinative" test. The *Washington II* standard, however, rejected the outcome determinative test because it compelled the reviewing court to substitute itself for the original factfinder. Being considered a speculative test, the analysis was avoided.

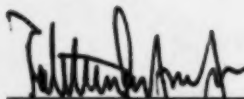
Under *Washington II* the burden on the petitioner is to show that ineffectiveness of counsel resulted in actual and substantial disadvantage

^{3/} We must believe the *Knight* test reaches the legally and constitutionally correct result in this case." *Armstrong v. State*, *supra*, 429 So.2d at 290.

to the course of his defense (*Washington v. Strickland*, 693 F.3d at 1262). The point of departure is the federal standard of the Fifth and Eleventh Circuits does not require a petitioner to show the disadvantage caused by counsel's deficiency adversely determined the outcome, only the course of the defense. Both decisions articulate standards under the Sixth Amendment to the Constitution of the United States. Until *Strickland v. Washington* (U.S. Sup.Ct. Case No. 82-1554) is decided the duality may be expected to continue.

The application of the *Knight* test by the Florida Supreme Court to the case of Petitioner effectively required him, on the basis of a record undeveloped by an evidentiary hearing, to make specific allegations of fact which, if true, would show conclusively that the outcome of the trial would have been different in order to be entitled to an evidentiary hearing. The application of the "outcome determinative" test enunciated in *Knight v. State*, 394 So.2d 997 (Fla. 1981) rather than that set forth in *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. 1982) (*en banc*). This error was preserved in the Statement of Judicial Acts to be Reviewed filed immediately after denial of the Motion for Post Conviction Relief on 09 March 1983. The same point was also fully briefed and argued before the Florida Supreme Court in the appeal from denial of the Motion for Post Conviction Relief.

Respectfully Submitted.



ROBERT AUGUSTUS HARPER, JR.
Pro Bono Counsel for Petitioner
Robert Augustus Harper, Jr. & Assoc.
308 East Park Avenue
Post Office Box 10132
Tallahassee, Florida 32302
(904) 224-5900

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

83-6549

JIMMY LEE SMITH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO.

RECEIVED

APR 11 1984

OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

PETITIONER, JIMMY LEE SMITH, by and through undersigned counsel and pursuant to Rule 46.1, U.S. Sup. Ct. Rules, moves the Court for leave to proceed *in forma pauperis* and alleges:

1. The Affidavit of Petitioner is attached.
2. Leave to appeal *in forma pauperis* was sought and granted in the State court of final resort the Supreme Court of Florida; review of the State court judgment is sought.
3. The substantive document, being a Petition for Writ of Certiorari is being filed contemporaneously and separately.

Respectfully Submitted.



ROBERT AUGUSTUS HARPER, JR.
Pro Bono Counsel for Petitioner
Robert Augustus Harper, Jr. & Assoc.
308 East Park Avenue
Post Office Box 10132
Tallahassee, Florida 32302
(904) 224-5900

AFFIDAVIT IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

I, JIMMIE LEE SMITH, being first duly sworn, depose and say that I am the Petitioner in the above-entitled cause; that in support of my motion to proceed on petition for writ of certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress and that the issues which I desire to present on review are the following:

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting the appeal are true.

1. Are you presently employed?

- (a) If the answer is yes, state the amount of your salary and give the name and address of your employer.

~~Yes/No~~

- (b) If the answer is no, state the date of last employment and the amount of the salary and wages per month which you received.

Apr 1978. \$560⁰⁰ / month

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

- (a) If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

~~Yes/No~~

3. Do you own any cash or checking or savings account?

- (a) If the answer is yes, state the total value of the items owned.

~~Yes/No~~

4. Do you own any real estate, stocks, bonds, notes, automobile, or other valuable property (excluding ordinary household furnishings and clothing)?

- (a) If the answer is yes, describe the property and state its approximate value.

~~Yes/No~~

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NONE

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

Jimmie Lee Smith
JIMMIE LEE SMITH

STATE OF FLORIDA
COUNTY OF

Sworn to and Subscribed before this 5TH day of APRIL, 1984.

Notary Public
NOTARY PUBLIC

State of Florida at Large:

My Commission Expires 6/14/86

STATE OF FLORIDA,	:	IN THE CIRCUIT COURT OF
	:	THE FOURTEENTH JUDICIAL
Plaintiff,	:	CIRCUIT FOR THE STATE OF
	:	
-vs-	:	CASE NOS. 5-78-200 and
	:	5-78-201
	:	
JIMMY LEE SMITH,	:	IN AND FOR JACKSON COUNTY,
	:	FLORIDA
Defendant.	:	

STATEMENT OF JUDICIAL ACTS TO BE REVIEWED
AND DESIGNATION TO COURT REPORTER

The Defendant, JIMMY LEE SMITH, files the following
Statement of Judicial Acts to be reviewed:

1. Denial of Motion for Post-Conviction Relief
(Rule 3.850, F.R.Cr.P.)
2. Denial of Motion for Post-Conviction Relief
without full and fair hearing.
3. Denial of Motions filed with the Motion for
Post-Conviction Relief.

The Defendant files the following designation to the
Court Reporter directing preparation of the following
transcripts:

Hearing held March _____, 1983.

Respectfully submitted,

Nora Leto
2422 Chestnutwood Drive
Lakeland, Florida 33801

Dennis W. Hartley
Hartley, Obernesser & Olson
407 South Tejon
Colorado Springs, Colorado 80903
Local Address:
222 West Pensacola Street
Tallahassee, Florida 32301

ATTORNEYS FOR THE DEFENDANTS

I hereby certify that a copy of the foregoing has been furnished by mail to JIM SMITH, Esquire, Attorney General, State of Florida, the Capitol, Tallahassee, Florida 32301 and to LEO C. JONES, State Attorney, Bay County Courthouse, Panama City, Florida 32401 this ____ day of March, 1983.

A2

been afforded ample opportunity to present evidence in mitigation in the original sentencing proceeding. The same reasoning applies here.

[3] Defendant's third point is equally unavailing. The trial court found that the capital felony was committed while the defendant was engaged in the commission of a robbery and also that it was committed for pecuniary gain. In its finding concerning the "pecuniary gain" circumstance, the court specifically stated that it was considered in conjunction with "robbery" circumstance. This is not contrary to the dictates of *Provence v. State*, 337 So.2d 783 (Fla.1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977), wherein we held that in all robbery-murders only one of these two aggravating circumstances can be found. We assume that the judge had *Provence* in mind when he specifically considered these two circumstances in conjunction. The word "conjunction" itself connotes a joining together to form one. While it may have been better practice to omit one of the factors completely in deference to the other, we cannot say that failure to do so is error.

[4] Defendant's last point concerning the presentence investigation report is without merit. The trial court is entitled by Rule 3.710, Florida Rules of Criminal Procedure, to draw its own conclusion from information in the report in capital cases. *Swan v. State*, 322 So.2d 485 (Fla.1975). In accordance with the dictates of *Gardner, supra*, the defendant was provided an opportunity to rebut.

Accordingly, the sentence of death is hereby affirmed.

It is so ordered.

SUNDBERG, C. J., and BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.



Jimmy Lee SMITH, Appellant,

v.

STATE of Florida, Appellee.

No. 55961.

Supreme Court of Florida.

Nov. 12, 1981.

Rehearing Denied Jan. 28, 1982.

Defendant was convicted in the Circuit Court, Jackson County, Robert L. McCrary, Jr., J., of first-degree murder and sentenced to death. Appeal was taken. The Supreme Court, Adkins, J., held that: (1) the trial court did not improperly comment on the weight of confession evidence; (2) although the trial court failed to instruct the jury on weight to be given the defendant's confessions, that error did not warrant new trial; (3) the defendant waived any claim of error on the grounds that a complete record of the proceeding below was not available when it was his counsel that instructed the court reporter not to report his final argument; (4) the death penalty statute does not violate the Constitution by attempting to govern practice and procedure; (5) defendant was not entitled to new trial on the ground of alleged mental deficiency; (6) the exclusion of jurors who expressed opposition to the death penalty was proper; (7) trial court did not err by allowing the defendant to waive representation by counsel at sentencing phase of his trial; (8) aggravating and mitigating circumstances were properly considered; and (9) when there were two aggravating circumstances, even if one was not supported by evidence, that would not justify reversal of the sentence.

Affirmed.

Alderman, J., concurred specially with an opinion in which Boyd, J., concurred. Sundberg, C. J., dissented.

1. Criminal Law — 656(9)

In murder prosecution, comments made by trial court that statement was freely and

voluntarily given by defendant made at various times during proceedings were not improper comment on weight of confession evidence during course of trial, since trial judge was making, with unmistakable clarity, finding for record that defendant's confessions were voluntarily made. U.S.C.A. Const.Amend. 5, 14; West's F.S.A.Const. Art. 1, § 9.

2. Criminal Law —1173.2(8)

In murder prosecution, although trial court erred in failing to instruct jury on weight to be given defendant's confessions, that error did not warrant new trial where there was other evidence upon which conviction could be based.

3. Criminal Law —1038.2, 1038.3

Trial court's failure to instruct jury on weight to be given defendant's confessions in murder prosecution was not fundamental error, cognizable for first time on appeal, in light of defendant's failure to request that instructions be given jury and to object when court failed to do so.

4. Criminal Law —660

It was not necessary to vacate and remand murder conviction and imposition of death penalty, for failure to record defense counsel's closing argument at guilt phase of trial where defense counsel instructed court reporter not to report final argument, in that right to complete review was waived by such instruction.

5. Criminal Law —1206(1)

Death penalty statute does not violate Florida Constitution by attempting to govern practice and procedure. West's F.S.A. § 921.141; West's F.S.A.Const.Art. 5, § 2(a).

6. Criminal Law —1189

In murder prosecution, alleged evidence of mental deficiency on part of defendant did not compel new trial in interest of justice where findings of psychologists were considered by judge and jury and, although psychologists recommended that defendant undergo further tests, he specifically declined to do so.

7. Homicide —345

In murder prosecution, psychological findings were not so internally inconsistent as to require reversal of imposition of death penalty.

8. Jury —108

Three jurors who expressed opposition to death penalty were properly excused for cause in murder prosecution in light of testimony of each juror that under no circumstances would he vote to put person to death. U.S.C.A.Const.Amend. 6.

9. Criminal Law —641.4(1)

Self-representation by defendant in criminal proceedings is not per se improper. U.S.C.A.Const.Amend. 6.

10. Criminal Law —641.4(2)

Waiver of one's right to counsel must be intelligent and knowing relinquishment of such representation. U.S.C.A.Const. Amend. 6.

11. Criminal Law —641.4(4)

In murder prosecution, trial court did not err by allowing defendant to waive representation by counsel at sentencing phase of his trial where defendant was closely questioned concerning his desire to make closing argument himself, he was warned of dangers of what he was doing and discouraged from doing so. U.S.C.A. Const.Amend. 6.

12. Homicide —354

In murder prosecution, trial court did not err in sentencing defendant to death penalty by considering defendant's uncorroborated confessions to various crimes when there was no showing of corpus delicti for any prior offenses in order to negate otherwise applicable mitigating circumstance of lack of significant history. West's F.S.A. §§ 921.141, 921.141(6)(a).

13. Criminal Law —1206(1)

Although consideration of all mitigating circumstances is required when death penalty is imposed, decision of whether particular mitigating circumstance is proven and weight to be given to it rest with judge and jury. West's F.S.A. § 921.141; U.S.C.

A.Const.Amends. 5, 14; West's F.S.A.Const. Art. 1, § 9.

14. Homicide — 354

In homicide prosecution, trial court did not err in sentencing by refusing to find as mitigating circumstances that defendant was under influence of extreme mental or emotional disturbance and/or that his capacity to appreciate criminality of his conduct or to conform his conduct to requirements of law was substantially impaired. West's F.S.A. § 921.141(6)(b, f).

15. Homicide — 354

In murder prosecution, even if evidence was insufficient to prove that defendant murdered second victim to hinder law enforcement, imposition of death penalty would be justified in light of proper finding of aggravating circumstance of heinous, atrocious, and cruel manner of killing. West's F.S.A. § 921.141.

Michael M. Corin and John D. C. Newton, II, Asst. Public Defenders, Tallahassee, for appellant.

Jim Smith, Atty. Gen. and Carolyn M. Snurkowski, Asst. Atty. Gen., Tallahassee, for appellee.

ADKINS, Justice.

Appellant, Jimmy Lee Smith, was convicted of the first-degree murders of Bonnie Ward and her twelve-year-old daughter, Donna Strickland. The trial judge imposed the death sentence in accordance with the jury's advisory sentence recommendation. We have jurisdiction. Art. V, § 3(b)(1), Fla.Const.

Appellant had spent the night before the murders as a guest in Mrs. Ward's home, and during the course of the evening both of his victims had spoken disparagingly of his girlfriend and her mother. Appellant's girlfriend was referred to as a whore and her mother's childrearing abilities criticized. On the day of the murders, appellant rode with Mrs. Ward, her three-year-old son, two-year-old daughter, and Donna to run several errands. During this trip, his girl-

friend and her family were again criticized, and at that time appellant evidently decided to kill Mrs. Ward and Donna. On the way home from the errands, Mrs. Ward complied with appellant's request that she drive down a deserted country road to a spot where he claimed to have hidden a bundle of clothing which he wished to retrieve. After arriving at the spot, appellant ordered the children to stay in the car and forced Mrs. Ward, who by then realized that the request was a ruse, over her protestations and pleas, to accompany him on foot around a bend in the road. Once he thought that they were out of the sight of the children in the car, appellant began choking Mrs. Ward, exhorting her to "Die, Bitch." After Mrs. Ward had lost consciousness, Donna, who had left the car to look for the two adults, came upon the scene, whereupon appellant grabbed and began choking her also. Encountering difficulty in choking Donna with his hands, appellant held her by the neck with one hand and with the other took from his pocket a piece of cord which he then used to choke her.

After Donna lost consciousness, appellant undressed his still-living victims and stabbed each repeatedly in the chest, inflicting multiple wounds on both. Whatever it was that drove him still not satisfied, he proceeded to slit Mrs. Ward's throat and to cut open Donna's chest and look at her heart. Once he finished, appellant wrapped the bodies in blankets, left them in the brush, and drove the two younger children home, where he fed them and put them to bed. He was picked up the next day by an officer who saw him hitchhiking.

Appellant now asks this Court to order a new trial or, at least, a new sentencing hearing to remedy the errors which he contends occurred during his trial. We address the issues on appeal in the order in which he raises them.

First, appellant contends that he was denied due process of law and equal protection of the laws within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution and article I.

section 9, of the Florida Constitution. In support thereof, he asserts that the trial court failed to properly instruct the jury on the weight to be given his confessions, and instead improperly commented thereon as evidence during the trial.

[1] We do not agree with appellant's argument that the trial court improperly commented on the weight of the confession evidence during the course of the trial. The comments complained of are the following, made at various times during the proceedings:

The Court has ruled that the statement has been freely and voluntarily given by the Defendant, Jimmy Lee Smith, and admitted into evidence. It will be for your consideration at this time.

The Court will rule that this statement was freely and voluntarily given. It will be admitted into evidence at this time.

The Court will rule that that statement was freely and voluntarily given and will now be admitted into evidence.

We see the statements as attempts to comply with the requirement expressed in *Sims v. Georgia*, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967), that the trial court clearly indicate, in the record, its conclusion that any confession admitted into evidence was voluntarily made:

[I]t is not for the jury to make the primary determination of voluntariness. Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity.

Id. at 544, 87 S.Ct. at 643.

Referring to the same topic, this Court stated as follows:

The requirement of the Fourteenth Amendment is that the trial judge make a determination that a confession was freely and voluntarily given before he allows it to be considered by a jury. A specific finding of voluntariness is necessary to ensure that a judge has properly met this requirement.

McDole v. State, 283 So.2d 553, 554 (Fla. 1973) (citations omitted).

The judge in the case *sub judice* was doing just that: making, with unmistakable clarity, a finding for the record that appellant's confessions were voluntarily made. His comments, therefore, were not improper.

[2] Appellant's other argument, that the court failed to instruct the jury on the weight to be given his confessions, is a valid point. We do not agree, however, that the error warrants a new trial. Appellant correctly states that the "law of the case" upon which the judge must charge the jury includes the weight to be given confessions. See § 918.10(1), Fla.Stat. (1977); Fla.R. Crim.P. 3.390(a); *Harrison v. State*, 149 Fla. 365, 5 So.2d 703 (1942). Appellant then cites several cases in which failure to so instruct the jury was found to be grounds for reversal and award of a new trial. The cases cited are not, however, on "all-fours" with the case at hand.

In *Harrison v. State* the defendant was never placed on the stand and never testified before the jury. It was acknowledged that there could have been no conviction without the confession, and defendant's counsel objected to the admission into evidence of the confession. In its decision, this Court held that the trial court had erred by not instructing the jury on the law of the case because it had a duty to do so "under the circumstances of this case." *Id.* 5 So.2d 707 (emphasis added).

Brown v. State, 124 So.2d 481 (Fla.1960), which was also cited by appellant and which concerned the propriety of jury instructions on degrees of homicide, simply cited *Harrison* as an example of how failure to advise the jury on the weight to be given a confession could be fundamental error.

Bunn v. State, 363 So.2d 16 (Fla.3d DCA 1978), cert. denied, 363 So.2d 1373 (Fla. 1979), addressed the propriety of a trial court's refusal to give the jury instructions regarding evaluation of certain admissions which the defendant had made. The dis-

strict court reversed the conviction, emphasizing that a request for instructions had been made:

[T]he failure of the trial court, pursuant to appellant's request for such an instruction prior to the time the jury retired, to give either the Florida Standard Jury Instruction (criminal) 2.13(i) or another appropriate instruction constituted reversible error.

Id. at 17 (emphasis added).

The case *sub judice* is distinguishable from those cited by appellant. The state did not rely entirely on appellant's confession to obtain a conviction. There was evidence presented, other than appellant's confession, upon which the conviction could be based. On Monday morning Bonnie Ward, Donna, and the two small children were in the Ward vehicle with defendant. They went to a hospital and visited another daughter, Dana, at about 11:30 a.m. Bonnie Ward was wearing her watch.

In mid-afternoon defendant went to a bank and attempted to cash a check. He was alone in Bonnie's automobile. When a policeman approached, defendant fled in the car. After a high speed chase, he eluded the officer.

On Tuesday defendant was arrested while hitchhiking. He had abandoned the vehicle, but had a knife and Bonnie's watch in his possession.

On Wednesday the small child was able to communicate with the officers so that they were led to the scene of the crime. This evidence was sufficient to show, beyond a reasonable doubt, that defendant was with the victims at the time of the murder. This, considered with the theft of the watch, possession of a knife suitable for use in committing the homicides, and the flight of the defendant, amounts to clear proof of the guilt of defendant.

We have held that where there exists other evidence, in addition to a confession, sufficient to sustain a conviction, failure by a court to, of its own motion, charge a jury regarding the consideration to be given said confession is not error requiring a new trial. See *Brunke v. State*, 160 Fla. 43, 33 So.2d 226 (Fla.1948).

Nor contrary to the cited cases, does there seem to be any reason to doubt the validity and voluntariness of appellant's confession. During the sentencing phase he personally addressed the jury, admitted to having committed the murders, and asked for imposition of the death penalty.

[3] It also bears note that appellant did not request that instructions be given the jury and did not object when the court failed to do so. In the cases cited, either a request for instructions was made or an objection raised to the absence thereof.

We therefore do not find the trial court's failure to instruct the jury regarding appellant's confessions to be "fundamental error," cognizable for the first time on appeal and requiring reversal of the trial court's decision. Unlike the cited cases, whatever error that may have occurred here was harmless error, and the circumstances of this case do not warrant a new trial as a result thereof.

[4] Appellant next argues that because a complete record of the proceeding below is not available for review by this Court (appellant's counsel's closing argument at the guilt phase of the trial was not recorded), the decision should be vacated and remanded. We decline to do so because it was appellant's counsel that instructed the court reporter not to report his final argument. Clearly, had the appellant been deprived the opportunity of a complete review through no fault of his own, there would be precedent for vacating the trial court's decision. *Delap v. State*, 350 So.2d 462 (Fla. 1977). But the right to review by an appellate court of the whole record may be relinquished, hence, our observation in *Delap* that "[i]n the absence of a waiver, the defendant has a right to complete review." *Id.* at 463, n. 1. (emphasis added). The right to a complete review here was waived when appellant's counsel instructed the court reporter not to record his closing argument, and appellant is not entitled to a new trial on the basis of the reporter's compliance with those instructions.

On the same point, appellant also argues that Rule 2.070(b), Florida Rules of Judicial Administration, mandates vacation of the trial court's decision. That rule provides:

(b) *Record* When trial proceedings are being reported, no part of the proceedings shall be omitted unless all of the parties agree to do so and the court approves the agreement.

While there is no showing that the parties agreed to omit recitation of appellant's counsel's closing argument, or that the court approved of such, it was, nevertheless, appellant's counsel that instructed the court reporter not to record his closing argument, and in the absence of fundamental error appellant may not now raise the matter on appeal.

[5] Contrary to appellant's argument in his third point on appeal, we have held that section 921.141, Florida Statutes, does not violate the requirements of article V, section 2(a), Florida Constitution, by attempting to govern practice and procedure. See *Dobbert v. State*, 375 So.2d 1069 (Fla.1979), cert. denied, 447 U.S. 912, 100 S.Ct. 3000, 64 L.Ed.2d 862 (1980).

[6] We are not convinced, as appellant next contends, that heretofore unconsidered evidence of mental deficiencies on his part compels a new trial "in the interest of justice." Appellant was examined and tested by two psychologists whose findings were then considered by the judge and jury. Although the psychologists recommended that appellant undergo further tests, he specifically declined to do so, and, at the sentencing portion of his trial, tendered no evidence regarding a possible mental deficiency.

[7] Furthermore, despite appellant's contention to the contrary, the psychological findings which were considered are not so internally inconsistent as to be almost useless. The psychological report stated, in part:

Even if an organic disorder were found to be present, we feel that it would not minimize the long standing maladaptive features of his personality nor would it

render him legally insane. The critical aspect is that Jimmy has a chronic history of difficulty in being aware of [.] accepting [.] and dealing with his feelings of anger. In fact, the personality evolution points to a profound deficiency in character development and the associated problems in impulse control. Should, however, an organic disorder be detected, we would be willing to render an opinion regarding possible mitigating circumstances.

The doctors' report is unequivocal; appellant was not legally insane.

The supplemental report which appellant now seeks to have considered was never before the trial court because at that stage of the proceedings appellant refused to undergo further testing. Now he seeks to undo his prior action. Appellant charted his own course, willingly and knowingly, and the psychological report weighed by the judge and jury was definite, proper and consistent. There was no error.

[8] Appellant's next point on appeal is that the exclusion of three jurors who expressed opposition to the death penalty violated his Sixth Amendment right to a jury chosen from a random cross-section of the community. More specifically, appellant contends that the excusal of the three did not comport with the United States Supreme Court's ruling in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). In light of the testimony by each of the jurors in question that under no circumstances would he vote to put a person to death, we are of the opinion that the *Witherspoon* holding was complied with, and that they were properly excused for cause. See *Fleming v. State*, 374 So.2d 954 (Fla.1979); *Foster v. State*, 369 So.2d 928 (Fla.), cert. denied, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979); and *Jackson v. State*, 366 So.2d 752 (Fla.1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979).

[9, 10] Appellant's sixth point on appeal, that the trial court erred by allowing him to waive representation by counsel at the sentencing phase of his trial, is also without

merit. At the outset, we note that self-representation by a defendant in a criminal proceeding is not per se improper. "[I]n the absence of unusual circumstances an accused who is mentally competent and sui juris has the right to conduct his own defense without counsel by virtue of Section 11, Declaration of Rights, Florida Constitution." *State v. Capetta*, 216 So.2d 749, 750 (Fla.1968), cert. denied, 394 U.S. 1008, 89 S.Ct. 1610, 22 L.Ed.2d 787 (1969). The waiver of one's right to counsel must, however, be an intelligent and knowing relinquishment of such representation. This Court, when faced with a question regarding the propriety of such a waiver in *Goode v. State*, 365 So.2d 381 (Fla.1978), cert. denied, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979), cited the decision of the United States Supreme Court in *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), which noted:

Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that record will establish that "he knows what he is doing and his choice is made with eyes open."

Here, weeks before trial, Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel. The record affirmatively shows that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will. The trial judge had warned Faretta that he thought it was a mistake not to accept the assistance of counsel, and that Faretta would be required to follow all the "ground rules" of trial procedure. We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on *voir dire*. For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.

Id. at 835-36, 95 S.Ct. at 2541. (Citation and footnotes omitted.)

[11] Applying the *Faretta* criteria in the case *sub judice*, we do not find appellant's waiver of counsel to have been improperly permitted. The record makes it quite clear that appellant wanted to make the closing argument at the sentencing phase of his trial himself rather than have his attorney do so. It also makes it clear that he was literate, competent, and understanding. He was apprised of the danger of what he was doing, of the seriousness thereof, and that a very real result might be imposition of the death penalty. He was warned that the prosecutor would not "back up," regardless of who made the closing argument for the defense, and would vigorously seek the death penalty. He was strongly urged to allow his attorney to make the closing argument, but insisted on doing so himself.

We need not inquire whether appellant knew all of the specifics regarding aggravating and mitigating circumstances and the like. Paraphrasing the opinion in *Faretta*, we need make no assessment of how well or poorly appellant mastered the intricacies of the sentencing process, for his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself. The trial judge questioned appellant closely concerning his desire to make the closing argument himself. Appellant was warned of the dangers of what he was doing and discouraged from doing so. He was not lightly allowed to follow the course which he chose. The court fulfilled its obligation, as enunciated in *Faretta*, and no reversible error occurred.

[12] In the seventh point on appeal, appellant contends that the trial court erred in sentencing by considering his uncorroborated confessions to various crimes when there was "no showing of a corpus delicti for any prior offenses." Appellant argues that the trial judge's finding of a significant history of prior criminal activity, when there was no evidence of such other than statements made by appellant, violated the

corpus delicti principle. However, that principle, which requires some independent proof of a crime other than a confession before one may be convicted, does not mandate the reversal suggested, for the following reasons.

Section 921.141, Florida Statutes (1979), lists the aggravating and mitigating circumstances to be considered in determining an appropriate sentence in a capital case. Section 921.141(6)(a) provides that lack of a significant history of prior criminal activity is to be considered a mitigating factor. Noting that aggravating circumstances must be proven beyond a reasonable doubt, *State v. Dixon*, 283 So.2d 1 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), and the particular need for accuracy when a life is at stake, appellant argues that there must be competent, independent proof of significant prior criminal activity in order to negate the mitigating circumstance established by section 921.141(6)(a). We have, however, specifically held otherwise.

In *Washington v. State*, 362 So.2d 658 (Fla.1978), cert. denied, 441 U.S. 937, 96 S.Ct. 2063, 60 L.Ed.2d 666 (1979), a death sentence was appealed from in part on the basis of an allegedly improper refusal by the court to consider lack of a significant history of prior criminal activity as a mitigating circumstance. The trial court had refused to recognize the alleged mitigating circumstance because the appellant had carried on a course of burglaries, had stolen property for a significant period of time, and had confessed and testified to such in open court. The appellant asserted that the trial court had acted improperly, that on the basis of our decision in *Provence v. State*, 337 So.2d 783 (Fla.1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977), previous convictions are required to negate section 921.141(6)(a). We upheld the trial court, however, observing:

[Appellant] misconstrues the holding of *Provence*. That case construed Section 921.141(5)(b) which requires previous conviction of another capital felony involving the use or threat of violence. . . . Sec-

tion 921.141(6)(a) makes no reference to conviction and, hence, *Provence* has no application to the instant case.

Washington, at 666-67.

Thus in the case *sub judice*, as in *Washington*, the trial court, on the basis of confessions made by the appellant, properly found that the appellant had a significant history of prior criminal activity which negated the otherwise applicable mitigating circumstance of section 921.141(6)(a).

[13] Nor, proceeding to appellant's eighth point on appeal, did the trial court err in sentencing by refusing to find as mitigating circumstances that the appellant was under the influence of extreme mental or emotional disturbance and/or that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. See sections 921.141(6)(b) and (f). Although consideration of all mitigating circumstances is required by the United States Constitution, *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rest with the judge and jury. *Lucas v. State*, 376 So.2d 1149 (Fla.1979).

[14] The appellant cites several cases in which the mitigating circumstances of sections 921.141(6)(b) and/or (f) were applied as a result of evidence pertaining to the defendant's state of mind. In two of these cases, *Burch v. State*, 343 So.2d 831 (Fla. 1977), and *Shue v. State*, 366 So.2d 387 (Fla.1978), we reversed death sentences because the trial judges had ignored the juries' recommendations of a life sentence. Although both cases demonstrate that evidence regarding a defendant's mental state may be taken in mitigation, their greater emphasis seems to be on the deference which is to be accorded a jury's sentencing recommendation. The jury here recommended imposition of the death penalty.

Also cited is our decision in *Huckaby v. State*, 343 So.2d 29 (Fla.), cert. denied, 434 U.S. 920, 98 S.Ct. 393, 54 L.Ed.2d 276 (1977),

in which we vacated a death sentence for failure by the trial court to recognize the existence of certain mitigating circumstances. Explaining why the lower court ought to have recognized the mitigating circumstances, we noted:

The trial judge ignored every aspect of the medical testimony in this case when he found that no mitigating circumstances existed. There was almost total agreement on Huckaby's mental illness and its controlling influence on him. Although the defense was unable to prove legal insanity, it amply showed that Huckaby's mental illness was a motivating factor in the commission of the crimes for which he was convicted. Our review of the record shows that the capital felony involved in this case was committed while Huckaby was under the influence of extreme mental or emotional disturbance, and that while he may have comprehended the difference between right and wrong his capacity to appreciate the criminality of his conduct and to conform it to the law was substantially impaired. These findings constitute two mitigating circumstances which should have been weighed in determining his sentence.

Id. at 33-34.

While the situation in *Huckaby* warranted an invasion of the trial court's domain, such is not the case here. The trial court here did not ignore every aspect of the medical testimony regarding the appellant; rather, it found that the medical testimony simply did not compel application of a mitigating factor in sentencing. Unlike the court in *Huckaby*, the trial court did not improperly refuse to recognize certain mitigating circumstances; rather, it considered the evidence presented regarding the defendant's mental state and then made its decision, which we are not to disturb unless absolutely required to do so.

Relevant to this situation is our decision in *Lucas v. State*, wherein we refused to interfere with the trial court's decision regarding mitigating circumstances, noting:

Appellant next argues that the evidence supports the existence of at least

two mitigating circumstances which the trial court failed to take into consideration. During the sentencing hearing, defense counsel produced a psychiatrist who testified that appellant knew right from wrong, but suffered from a sociopathic personality resulting in defective judgment. Other witnesses testified to appellant's abnormal appearance and behavior on the evening of the shooting. Appellant contends that this testimony proves that he was under extreme mental or emotional disturbance at the time of the commission of the offense (section 921.141(6)(b)) and could not appreciate the criminality of his conduct. (Section 921.141(6)(f)). In response, the state argues that it lies within the province of the trier of fact to weigh the evidence presented. We agree. The jury and the judge heard the testimony, and apparently concluded that the testimony should be given little or no weight in their decisions. We find nothing in the record which compels a different result.

376 So.2d at 1153-54.

In *Hargrave v. State*, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979), we considered a similar question and held:

Returning to appellant's argument that the trial judge erred in failing to find the mitigating circumstances delineated above, we respond that the jury and the judge could have resolved the evidence in favor of appellant's position, but neither was compelled to do so. We are not here dealing with a case where either the jury or the court considered matters it should not have considered or failed to consider matters it should have considered. Appellant simply disagrees with the force and effect given to the testimony of a psychologist and a psychiatrist at the sentencing hearing.... [T]he trial judge did not ignore or fail to consider the psychological evidence bearing on mitigation. Obviously, he and the jury were not persuaded that it provided a sound

basis for establishment of the statutory mitigating circumstances.

Id. at 5-6 (emphasis added).

Clearly then, we are not warranted to disturb the trial court's findings. There was nothing improper in the conclusions reached nor in the method by which they were reached. The decision was one within the domain of the judge and jury, and a reversal thereof is not justified simply because appellant draws a different conclusion from the testimony presented than did the jury.

[15] The final point raised on appeal by appellant is that the evidence presented was insufficient to prove that he murdered Donna Strickland to hinder law enforcement. He objects to the trial court's first finding of fact as to aggravating circumstances, which reads, in part:

The capital felony charged in Count II of the Indictment was committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws. . . . The Court specifically finds that the defendant then killed Donna Lynn Strickland to keep her from testifying against him for the murder of Bonnie Myrie Ward which she saw the defendant commit.

Appellant suggests several reasons why the above finding is improper, but, because of the court's second finding we need not address the merits of appellant's argument.

In his second finding of fact as to aggravating circumstances, the trial judge found that the murders for which appellant was convicted were committed in an especially heinous, atrocious, and cruel manner. The finding also noted that the manner in which appellant cut open the chest of Donna Strickland was particularly heinous, atrocious, and cruel and that "even were there no other aggravating circumstances in this case, this circumstance alone warrants the imposition of the death penalty." Although we agree that appellant's action in cutting open his younger victim's chest was particularly loathsome and reprehensible, we are of the opinion that the more heinous, atro-

cious, and cruel aspect of the killings was the manner in which he strangled his victims. Appellant described how both women struggled, shook spasmodically and looked into his eyes as he choked them. Both strangulations were prime examples of the "conscienceless or pitiless crime which is unnecessarily torturous to the victim" which we have established as heinous, atrocious, and cruel. See *State v. Dixon*, at 9.

Discussion of the proper basis for finding the killings heinous, atrocious, and cruel aside, the important point is that the trial court found two aggravating circumstances. Thus even were we to rule that Donna's murder was not committed to keep her from testifying against appellant, there would remain the aggravating circumstance of the heinous, atrocious, and cruel manner of the killings, and the imposition of the death penalty herein would still be justified. As we noted in *Dixon*:

When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla. Stat. § 921.141(7), F.S.A. [Now § 921.141(6)]

Id. at 9. Because there are two aggravating circumstances, and no mitigating ones, the sentence of death would not have to be overturned even if we were to find the first aggravating circumstance improper. The second finding alone is sufficient basis for imposition of the death penalty. Consideration of the merits of the first finding would be for naught, and so we decline to do so.

In light of the foregoing, we find that the trial court's decision was proper. Accordingly, the conviction and sentence imposed by the trial court are affirmed.

It is so ordered.

BOYD, OVERTON and McDONALD, JJ., concur.

ALDERMAN, J., specially concurs with an opinion, with which BOYD, J., concurs.

SUNDBERG, C. J., dissents.

ALDERMAN, Justice, concurring specially.

Although I concur with the affirmance of the conviction and sentence and the rationale of the majority for this affirmance, I would not avoid the issue of whether the trial court properly found the aggravating circumstance that Smith murdered Donna Strickland to hinder law enforcement. The majority finds it unnecessary to resolve this question because there is at least one viable aggravating circumstance and no mitigating circumstances, and therefore under *State v. Dixon*, 283 So.2d 1 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), death is presumed to be the proper sentence.

In my view, the trial court properly found that Smith murdered Donna to hinder law enforcement. In its sentencing order, the trial court explains its justification for this finding:

1. The capital felony charged in Count II of the Indictment was committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws. The evidence shows that the defendant coolly and calmly lured Bonnie Myrle Ward and her twelve year old daughter, Donna Lynn Strickland, to drive their automobile down a lonely dirt road through the use of a lie that the defendant had clothing cached in said location which he needed to retrieve. The defendant then caused Bonnie Myrle Ward to leave the car with him and was in the process of killing her through the means charged in the Indictment when Donna Lynn Strickland attempted to come to the aid of her mother. The Court specifically finds that the defendant then killed Donna Lynn Strickland to keep her from testifying against him for the murder of Bonnie Myrle Ward which she saw the defendant commit.

Accordingly, I would find that the trial court properly found two aggravating circumstances.

BOYD, J., concurs.

Amos Lee KING, Jr., Appellant,

v.

STATE of Florida, Appellee.

No. 61406.

Supreme Court of Florida.

Dec. 2, 1981.

Defendant appealed from the denial by the Circuit Court, Pinellas County, John S. Andrews, J., of his motion for postconviction relief. The Supreme Court held that defendant was not denied effective assistance of counsel.

Affirmed.

Criminal Law — 641.13(2)

Where defendant's attorney did not make any single act of omission or commission that was substantial and serious deficiency measurably below that of competent counsel, even though only 11 days intervened between end of his previous case and defendant's trial during which most of preparation for defendant's case occurred, defendant was not denied effective assistance of counsel. West's F.S.A. Rules Crim. Proc., Rule 3.850.

Baya Harrison, III of Fuller, Johnson & Harrison, Tallahassee, for appellant.

Jim Smith, Atty. Gen., and Michael J. Kotler, Asst. Atty. Gen., Tampa, for appellee.

PER CURIAM.

This is an appeal from a final order of the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, dated November 13, 1981, denying King's motion for postconviction relief filed pursuant to Florida

SMITH v. STATE

Cite as 445 So.2d 323 (Fla. 1983)

Fla. 323

judicial system and, ultimately, on the taxpayer. We will not ignore the substance of justice in a blind adherence to its forms.

Accordingly, the holding of the Second District in *Burney* is approved and that of the Fourth District in *Strasser* is quashed.

It is so ordered.

ALDERMAN, C.J., and ADKINS, BOYD, OVERTON and SHAW, JJ., concur.

McDONALD, J., dissents.

ON PETITION FOR REHEARING

EHRLICH, Justice.

[2] Respondent, in its petition for rehearing, points out that we failed to address the second issue raised in its brief, an issue which assumes greater significance in light of our disposition of the first issue.

Respondent points out that at trial the prosecutor elicited from a state witness evidence that Strasser had exercised his right to remain silent. The defense preserved the issue for appeal by timely objection and raised it before the district court. The district court reversed and remanded for new trial on the jury-instruction issue we addressed in our original opinion, and never addressed the issue on which we now focus.

We note that, in the absence of a decision from the district court, procedural formality would suggest that we should remand to the district court for entry of a decision on the issue. However, in light of this Court's decision in *State v. Burwick*, 442 So.2d 944 (Fla.1983), such procedural nicety would merely delay the judicial process without benefiting anyone. We therefore remand for new trial on the basis of *Burwick*.

For the record, we note that we have considered respondent's third point and find it to be without merit.

Thus, the decision of the district court is approved in result only and the cause is remanded for new trial.

It is so ordered.

APPENDIX C

BOYD, OVERTON, McDONALD and SHAW, JJ., concur.

ALDERMAN, C.J., dissents.



Jimmy Lee SMITH, Appellant,

v.

STATE of Florida, Appellee.

No. 63389.

Supreme Court of Florida.

Nov. 10, 1983.

Rehearing Denied March 8, 1984.

Prisoner who had been convicted of murder and sentenced to death sought postconviction relief. The Circuit Court, Jackson County, Robert L. McCrary, J., denied relief and prisoner appealed. The Supreme Court, Adkins, J., held that: (1) record did not show that defendant received ineffective assistance of counsel, and (2) prosecution had not withheld any *Brady* material.

Affirmed.

1. Criminal Law \S 998(3)

Issues which neither were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack.

2. Criminal Law \S 998(14)

When ineffective assistance of counsel is asserted, burden is on the appellant to specifically allege and establish grounds for relief and to establish whether such grounds resulted in prejudice to him.

3. Criminal Law \S 998(14)

In order to demonstrate ineffective assistance of counsel, specific omission of overt act upon which the claim is based

C1

must be detailed in the appropriate pleading, defendant must show that the specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel in view of the totality of the circumstances, defendant must show that, when considered under the circumstances of his case, there was a likelihood that the deficient conduct affected the outcome of the proceedings, and State must be given an opportunity to rebut those assertions by showing beyond a reasonable doubt that there was no prejudice in fact.

4. Criminal Law §998(17)

In the absence of showing as to what would have been discovered if counsel had not failed to do the specific acts which allegedly constituted ineffective assistance of counsel, record did not support claim of ineffective assistance.

5. Criminal Law §998(14)

Issue raised in unsworn motion could not be considered by court. West's F.S.A. RCrP Rule 3.850.

6. Criminal Law §700

Information concerning statements made by defendant's mother which would have lent credibility to defendant's statements was available to defendant prior to trial insofar as it involved defendant's own life story and prosecution had no *Brady* obligation to make those statements known to defendant.

Nora Leto, Lakeland, Robert Augustus Harper, Jr., Tallahassee, and Dennis W. Hartley, Colorado Springs, Colo., for appellant.

Jim Smith, Atty. Gen. and John W. Tiedemann, Asst. Atty. Gen., Tallahassee, for appellee.

ADKINS, Justice.

In 1978, appellant was convicted of two counts of first-degree murder and sentenced to death on each count. Upon direct appeal, this Court affirmed these convictions and sentences. *Smith v. State*, 407 So.2d 894 (Fla.1981), cert. denied, 456 U.S.

984, 102 S.Ct. 2260, 72 L.Ed.2d 864 (1982). After executive clemency proceedings the governor signed a death warrant. On March 2, 1983, appellant filed a motion to vacate the judgments and sentences pursuant to Florida Rule of Criminal Procedure 3.850 stating six grounds for relief and also sought an evidentiary hearing and a stay of execution. Prior to the hearing on these motions, appellant filed an amendment to his motion for post-conviction relief on three additional grounds. On March 9, 1983, the trial court denied appellant's motions for post-conviction relief without an evidentiary hearing incorporating a copy of the trial record to his order. The appellant filed this appeal. We have jurisdiction. Art. V, § 3(b)(7) & (9), Fla. Const.

Appellant alleged the following six grounds for relief in his original Rule 3.850 motion: 1) that the introduction into evidence of defendant's confession violated his right to counsel as guaranteed by the sixth and fourteenth amendments; 2) that the jury was improperly instructed on the issue of mitigating circumstances in violation of the defendant's rights under the eighth and fourteenth amendments; 3) that the jury was selected through procedures that systematically excluded from jury service persons having opposition to the death penalty in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); 4) that defendant was deprived of due process by the state's failure to provide notice of the aggravating circumstances upon which it intended to rely in violation of the eighth and fourteenth amendments; 5) that the failure to suppress defendant's post-arrest confession which was obtained after the defendant had invoked his right to consult counsel was in violation of the fifth, sixth and fourteenth amendments; and 6) that the defendant was denied the effective assistance of counsel at the guilt and penalty stages of his capital trial in violation of the sixth, eighth and fourteenth amendments. In addition to these grounds, the appellant alleged three other grounds in his amendment to his motion. Those grounds

are: 1) that the sentencing process ignored the safeguards of *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); 2) that the sentence should be vacated because non-statutory aggravating circumstances were found by the trial court in violation of the defendant's rights under the eighth and fourteenth amendments; and 3) that the state withheld mitigating facts from the defense in violation of defendant's rights under the fifth and fourteenth amendments.

[1] Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack. *Demps v. State*, 416 So.2d 808, 809 (Fla.1982); *Meeks v. State*, 382 So.2d 673, 675 (Fla.1980), *cert. denied*, — U.S. —, 103 S.Ct. 799, 74 L.Ed.2d 1002 (1983); *Adams v. State*, 380 So.2d 423, 242 (Fla. 1980).

We find that all except two of the foregoing issues were or could have been raised on direct appeal and therefore are precluded from our consideration by collateral review. The two issues which we will consider on this appeal are appellant's claim of ineffective assistance of counsel and the claim that the state withheld mitigating facts from the defense.

In support of appellant's ground based on the alleged ineffective assistance of trial counsel, he cites a number of specific instances in which counsel's failure to act allegedly amounted to ineffective assistance of counsel. Appellant asserts that counsel failed to make a motion to suppress any of the confessions introduced against the appellant. He also claims: 1) that counsel failed to cross-examine crucial witnesses and that the cross-examination of others was perfunctory; 2) that counsel's voir dire examination at appellant's trial was ineffective; 3) that counsel failed to investigate any information for the guilt or penalty phases of the trial; 4) that counsel failed to file any motions designed to aid in the defense of the appellant; and 5) that counsel failed to avail himself of significant facts and witnesses that may have been effective in presenting claims for mitigation

including developing any psychological testimony with regard to possible witnesses.

[2,3] When ineffective assistance of counsel is asserted, the burden is on the appellant to specifically allege and establish grounds for relief and to establish whether such grounds resulted in prejudice to him. *Meeks v. State*. This Court set standards for assessing whether the performance of counsel in a given situation amounts to legal incompetency in *Knight v. State*, 394 So.2d 997, 1001 (Fla.1981). We adopted the following four principles to make this determination. First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading. Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel. In making this second determination, the performance of counsel must be judged in light of the totality of the circumstances. *Meeks v. State*. Third, the defendant has the burden to show that this deficiency, when considered under the circumstances of his case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings. Fourth, in the event a defendant does show a substantial deficiency and presents a prima facie showing of prejudice, the state still has the opportunity to rebut those assertions by showing beyond a reasonable doubt that there was no prejudice in fact.

[4] Appellant has failed to allege specific facts to demonstrate that, but for any of the claimed omissions of trial counsel, the results of appellant's case would have been different. Nothing has been shown to this Court concerning what evidence would have been discovered had counsel not failed to do the specific acts which appellant claims constitute ineffective assistance of counsel. Appellant has failed the requirement under *Knight* of showing that any of

these deficiencies were substantial enough to demonstrate a prejudice to him.

In support of appellant's claim that the state withheld mitigating facts from the defense in this case in violation of his rights under the fifth and fourteenth amendments, appellant alleges that the prosecution withheld statements made by his mother which would have lent credibility to his statements which were made on video tape and would have added evidence in mitigation. Appellant relies on *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), as the legal basis for his argument.

[5, 6] The state argues, first of all, that this issue should not be considered by this Court because it was contained in an unsworn motion contrary to the requirements of the Florida Rules of Criminal Procedure. See Fla.R.Crim.P. 3.850. The trial court refused to consider this issue on this basis and we agree that the trial court was procedurally precluded from giving this issue consideration. Moreover, even if appellant's *Brady* claim had been preserved and even if we were to consider the merits of this claim, we would have to hold that it is insufficient as a matter of law. *Brady* requires that the defendant not be aware of the withheld evidence before or during trial. *Arango v. State*, 437 So.2d 1099 (Fla.1983). The information contained in the affidavit was obviously available to the appellant and to trial counsel insofar as it involves appellant's own life story.

Therefore, we must conclude that the appellant has failed to show any basis upon which we should grant him an evidentiary hearing. We affirm the order of the trial court.

It is so ordered.

ALDERMAN, C.J., and BOYD, OVERTON, McDONALD, EHRLICH and SHAW, JJ., concur.



James AGAN, Appellant,

v.

STATE of Florida, Appellee.

No. 60476.

Supreme Court of Florida.

Dec. 15, 1983.

Rehearing Denied March 8, 1984.

Defendant was convicted in the Circuit Court, Bradford County, R.A. Green, Jr., J., of first-degree murder, and was sentenced to death. Defendant appealed. The Supreme Court, Boyd, J., held that: (1) aggravating circumstances that defendant was under sentence of imprisonment at time of offense and that he had previously been convicted of crime involving violence could properly receive separate consideration, given that the two aggravating factors were not based on same essential feature of crime or of defendant's character; (2) defendant's lack of remorse was not considered improperly as aggravating circumstance, but, rather, was given limited consideration only to negate mitigation; (3) fact that defendant was 54 years of age was not mitigating circumstance; and (4) defendant's confession, appearance before grand jury, and pleading guilty were properly rejected as mitigating circumstances, inasmuch as any cooperation by defendant was, by his own admission, merely in furtherance of plan to receive only life imprisonment and thus to be able to return to prison and kill another inmate.

Affirmed.

1. Homicide — 354

Aggravating circumstances that defendant was under sentence of imprisonment at time that he committed murder, and that defendant had previously been convicted of crime involving violence, could be given separate consideration, inasmuch

IN THE SUPREME COURT OF FLORIDA

THURSDAY, MARCH 8, 1984

JIMMY LEE SMITH,

**

Appellant,

**

CASE NO. 63,389

vs.

**

Circuit Court Case Nos.

STATE OF FLORIDA,

**

5-78-200 and 5-78-201

Appellee.

**

(Jackson)

On consideration of the Petition for Rehearing filed by attorney for appellant, and reply thereto,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

The Motion for Stay filed by attorney for appellant is granted and the proceedings in this Court and the Circuit Court of the Fourteenth Judicial Circuit in and for Jackson County, Florida, are hereby stayed to and including April 9, 1984, to allow appellant to seek review in the Supreme Court of the United States and obtain any further stay from that Court.

A True Copy

C

TEST:

cc: Hon. Daun Crews, Clerk
Hon. Robert L. McCrary, Jr., Judge

Sid J. White
Clerk Supreme Court

Dennis W. Hartley, Esquire
of Hartley, Obernesser & Vaglica
Robert Augustus Harper, Jr., Esquire
John W. Tiedemann, Esquire

By: *Daphne Cousseau*
Deputy Clerk